

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2018-CA-000146-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 15-CR-00113

DANNY SWIFT

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: COMBS, TAYLOR, AND L. THOMPSON, JUDGES.

TAYLOR, JUDGE: The Commonwealth of Kentucky brings this appeal from a January 17, 2018, order and a January 24, 2018, amended order of the Grayson Circuit Court granting Danny Swift's motion to suppress crystal methamphetamine seized from his person. We vacate and remand.

On September 4, 2015, Detective Brandon Cook, of the Leitchfield Police Department, Detective Robert Dover, of the Greater Hardin County

Narcotics Task Force, and Grayson County Sheriff's Deputy Joey Beasley drove to Danny Swift's residence in Caneyville, Kentucky, to conduct a "knock and talk" after receiving information that Swift received a large amount of marijuana. Upon arriving at the residence, the officers knocked on the front door and advised Swift they received information that he possessed a large quantity of marijuana. Swift gave the officers consent to enter the residence whereupon the officers spotted in plain view several items they suspected were related to drug activity.<sup>1</sup> The officers asked permission to search in the garage, but Swift refused to consent. The officers then decided to obtain a search warrant for the garage. While waiting for the search warrant, Detective Dover placed Swift in handcuffs and conducted a pat-down for weapons. During the pat-down of Swift, Detective Dover detected a bulge in Swift's right front pocket which the Detective immediately believed to be a plastic baggie containing crystal methamphetamine. Detective Dover then reached into Swift's pocket and retrieved a baggie with seven grams of crystal methamphetamine.

On October 2, 2015, the Grayson County Grand Jury indicted Swift upon manufacturing methamphetamine (enhanced by possession of a firearm), first-degree trafficking in a controlled substance (enhanced by possession of a

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<sup>1</sup> These items include clear plastic baggie with the corners cut out, a hydrochloric gas generator cap and tube, a bowl with white powder residue, and a large piece of clear plastic tubing.

firearm), first-degree possession of a controlled substance (enhanced by possession of a firearm), possession of drug paraphernalia (enhanced by possession of a firearm) and third-degree escape. Subsequently, on May 3, 2016, Swift filed a motion to suppress the crystal methamphetamine seized from his person during the pat-down by Detective Dover. By Opinion and Order entered January 27, 2017, the circuit court denied the motion to suppress. The circuit court specifically concluded:

Once in custody and handcuffed, the police had the right to conduct a “pat[-]down” of his body. Swift’s resistance to restraint by the officer also buttressed the cause to pat him down. The Court concludes under the “plain feel” or “plain touch” rule the search was legal. *Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002) and *Commonwealth v. Jones*, 217 S.W.3d 190 (Ky. 2006) as corrected (Dec. 1, 2006). Based upon his training and experience, the officer had “probable cause” to associate the item with criminal activity. *Ball v. United States*, 803 A.2d 971, 975 (D.C. 2002). Also see *Baltimore v. Commonwealth*, 119 S.W.3d 532 (Ky. App. 2003).

The evidence found on Defendant Swift’s person should not be suppressed.

January 27, 2017, Opinion and Order at 3.

Swift then filed motions *in limine*. Therein, Swift sought “to prohibit the introduction of any evidence gleaned as a result of the pat[-]down search.”

November 27, 2017, Motions *in Limine* at 1. At an evidentiary hearing, the circuit court treated the motion as a motion to suppress the crystal methamphetamine

seized from Swift's person. Detective Dover testified that while conducting the pat-down, he immediately recognized crystal methamphetamine in Swift's front pocket.

By orders entered January 17, 2018, and January 24, 2018, the circuit court granted Swift's motion and ordered the crystal methamphetamine suppressed. The circuit court reasoned:

The testimony by Detective Robert Dover of the Greater Hardin County Task Force was he had no formal training at any police academy or continuing education classes by any accredited body to [sic] for touching and determining whether a substance in a suspect's pocket is illegal drugs. No evidence was produced [that] any such training ever existed or exists today. There is no Daubert standard upon which to verify the methodology. Further, Det. Dover's "expertise" came from his field experience over years as a county police officer in the field. There is no training which has any scientific or other validity for admission in a trial.

There was no testimony this search occurred in an area where drug trafficking is well known. It occurred inside a premises based upon a warrantless "knock and talk". The four occupants inside the premises were detained by Dover for three hours without being placed under arrest. Dover was waiting for a search warrant which could have been obtained prior to the search of Swift's pockets. Dover felt no weapons in his pat[-] down of Swift. Det. Dover never placed Swift under arrest. Dover had no right to continue his search into Swift's pockets after his safety pat[-]down revealed no weapons.

The evidence seized from Swift's pockets is suppressed. Defendant Swift is still facing charges which carry a very

long potential sentence if he is found Guilty at his jury trial.

January 24, 2018, Order at 2. This appeal follows.

As an appellate court, our review of a decision concerning the suppression of evidence is two-fold. *Commonwealth v. Marshall*, 319 S.W.3d 352, 357 (Ky. 2010). First, we determine whether the circuit court's findings of fact are supported by substantial evidence; if so, the findings are conclusive. *Id.* Second, we review the circuit court's application of law *de novo*. *Id.* Our analysis shall proceed accordingly.

The Commonwealth contends that the circuit court improperly granted Swift's motion to suppress the crystal methamphetamine seized from Swift's person. For the following reasons, we are compelled to agree.

When a police officer possesses reasonable suspicion of criminal activity, the officer may briefly detain the suspect and may also pat-down the suspect whenever it is reasonable to believe the suspect is armed and dangerous. *Marshall*, 319 S.W.3d at 356-57. During such protective pat-down, the officer may seize contraband only if it is "immediately identifiable" by "the plain feel" of the officer's hand. *Marshall*, 319 S.W.3d at 357; *see also Commonwealth v. Whitmore*, 92 S.W.3d 76, 80 (Ky. 2002). This exception to the warrant requirement is commonly known as the plain-touch rule. It must be emphasized that the incriminating nature of the contraband must be immediately identifiable by

the sense of touch and without the officer manipulating or moving the contraband. *Marshall*, 319 S.W.3d at 357; *Whitmore*, 92 S.W.3d at 80.

In the case *sub judice*, Detective Dover testified that he handcuffed Swift and performed a pat-down for weapons. Detective Dover stated that he had observed in plain view several weapons in the residence and was concerned that Swift could possibly possess a weapon. Upon his pat-down of Swift, Detective Dover testified that as soon as he felt the contraband, he knew it to be crystal methamphetamine and orally announced that Swift possessed a bag of crystal dope. Detective Dover explained that he had extensive experience patting-down numerous suspects who possessed crystal methamphetamine and was familiar with characteristics of the substance by touch.

At the hearing, Detective Dover's testimony was uncontroverted. However, the circuit court discounted the Detective's testimony because he lacked "formal training . . . for touching and determining whether a substance in a suspect's pocket is illegal drugs", even though the court acknowledged that no such training existed. January 24, 2018, Order at 2. The circuit court was concerned that Detective "Dover's 'expertise' came from his field experience over the years." January 24, 2018, Order at 2. So, the circuit court concluded that Detective "Dover had no right to continue his search into Swift's pockets after his

safety pat[-]down revealed no weapons.” January 24, 2018, Order at 2. We believe the circuit court committed an error of law.

The Kentucky Supreme Court has recognized that a police officer’s experience is sufficient to support the officer’s immediate recognition of contraband during a pat-down under the plain-touch rule. *Marshall*, 319 S.W.3d at 358-61; *Whitmore*, 92 S.W.3d at 80. Therefore, the circuit court erred by concluding that Detective Dover’s experience was insufficient to support his testimony that he immediately recognized crystal methamphetamine through touch during the pat-down. We, therefore, vacate the circuit court’s orders suppressing the crystal methamphetamine and remand for the circuit court to reconsider the motion to suppress in light of this Opinion.

For the foregoing reasons, the Order and Amended Order of the Grayson Circuit Court are vacated and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

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